CHAPTER 13

SCREENING AND PRE-TRIAL

13.1 SCREENING

Screening is a vitally important part of any prosecution and impaired driving cases are no exception. A careful review of the evidence and potential suppression issues will save an immense amount of grief later in the case. Since most traffic officers deal with hundreds of motorists and potentially dozens of DUI arrests in any given month, an impaired driving case will not get better with time.

Be ensuring that all of the relevant documents and other evidence are carefully preserved at the beginning of the case, it will be easier to present a trial on the matter, even if it takes places many months after the arrest.

Additionally, by careful screening procedure, factual shortcomings and legal obstacles can be dealt with at the beginning of the case.

A well-reasoned screening of a case can indeed be the ounce of prevention that will be vastly superior to the pound of cure necessary to correct weaknesses on the eve of trial. Additional care at the outset will allow the prosecutor to negotiate from a position of strength in any plea

discussions.

13.1.1 JURISDICTION

The matter of jurisdiction, or the appropriate in which to file the case, is not generally a matter of great concern. A first or second offense, Class B Misdemeanor DUI without an injury or accident would be filed in the appropriate justice court or the district court if the municipality or county has not justice court. A Class A Misdemeanor or Felony DUI must, of course be filed in the appropriate district court.

An important consideration in screening and preparation for a DUI case is that, if originally filed in justice court, the defendant will be entitled to a full trial de novo in justice court. Often referred to as “getting two bites at the apple”, this is a common defense tactic. Prosecutors should treat these as any other case and not be intimidated by the prospect of potentially conducting two jury trials in a DUI case.

13.1.2 THE CHARGING DECISION

As with all cases, the major criteria in deciding to charge with DUI is the prosecutor’s estimation of the reasonable likelihood of conviction on the charge. This estimation will be based primarily on information contained in the police report in four major areas:

- Manner of driving;
- Appearance, demeanor and admissions of the defendant;
- Performance on field sobriety tests; and
- blood / breath alcohol level, drug result, or a refusal to take a chemical test.

Of the four areas, the first and last are the most important, i.e. persuasive to juries. The reason for this being, perhaps, in the case of manner of driving, the juror can put him or herself in the position of a driver either following or facing the offending driver. The importance of BAC test or a refusal is probably best explained by Americans’ life-long love affair with the scientific and the technological.

The optimum situation, from a prosecutor's point of view, would be something like the following:

> Within ten minutes of the required closing time of a local bar, a peace officer's car traveling in the curb side lane is forced to brake abruptly to avoid hitting a red Corvette which has just pulled out of the parking lot of the bar in a manner designed to te4st the ability of the car to go from 0 to 60 mph in record time. The officer follows at twenty feet and over the course of the next two blocks observes the defendant proceed in a zig-zag pattern down the street, during which time he crosses the center line three times, forcing two oncoming cars (the occupants of which stop to give their names to the officer and will happily testify at trial) to take evasive action, and barely avoids a parked car, a street light, and a bus bench as he moves along the curb. The car continues its erratic journey for another two blocks after the officer has turned on both his lights and his siren.
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> The above circumstances, coupled with the inability of the suspect to produce his driver license, to recite the alphabet past the letter G (even though he has a Ph.D is nuclear physics, his admission to having two beers, each totalling a quart, and his submission to a chemical test which shows his BAC to .15%, would give the prosecutor a better than average chance of a conviction.

For good or ill, rarely will such a neat and trim DUI present itself to the prosecutor for a charging decision. If there is very little in the way of bad driving and there is no chemical test or a BAC below .08%, it may be wise to consider charging alternatives to DUI such as reckless driving, a traffic violation, Open Container, or other offenses.

However, simply because there is a low BAC, that does not mean a DUI may not be the appropriate charge. Depending on the age of the suspect, their drinking experience, and/or other medications they may be taking, a driver may well be impaired despite their BAC.

It is important that a prosecutor always review the DUI case based on a totality of the circumstances before making a charging decision. For example, if a suspect admits to drinking, taking a prescription pain killer, a dose of Nyquil and drinking two beers, it may very well be a high-quality DUI case despite a BAC of only .04.

As a final note, irrespective of any advice contained herein, every prosecutor should carefully follow their own office's policies relating to charging decisions. Many chief prosecutors have policies relating to screening which have been carefully considered and are based upon the needs of their respective communities.

13.2 BAIL AND PRE-TRIAL RELEASE

13.2.1 GENERALLY

An impaired driving case is subject to the same provisions for bail and pre-trial release as any other crime.

Ut. Const. Art. I, § 9 states;

> Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

Additionally, Utah Code Ann. § states:

77-20-1. Right to bail - Denial of bail - Hearing.

(1) A person charged with or arrested for a criminal offense shall be admitted to bail as a matter of right, except if the person is charged with a:

(a) capital felony, when the court finds there is substantial evidence to support the charge;

(b) felony committed while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when the court finds there is substantial evidence to support the current felony charge;

(c) felony when there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community, or is likely to flee the jurisdiction of the court, if released on bail; or

(d) felony when the court finds there is substantial evidence to support the charge and it finds by clear and convincing evidence that the person violated a material condition of release while previously on bail.

(2) Any person who may be admitted to bail may be released either on his own recognizance or upon posting bail, on condition that he appear in court for future court proceedings in the case, and on any other conditions imposed in the discretion of the magistrate or court that will reasonably:

(a) ensure the appearance of the accused;
(b) ensure the integrity of the court process;
(c) prevent direct or indirect contact with witnesses or victims by the accused, if appropriate; and
(d) ensure the safety of the public.

(3) The initial order denying or fixing the amount of bail shall be issued by the magistrate or court issuing the warrant of arrest or by the magistrate or court presiding over the accused's first judicial appearance. A person arrested for a violation of a criminal protective order issued pursuant to Section 77-36-2.5 may not be released prior to the accused's first judicial appearance.

(4) The magistrate or court may rely upon information contained in:

(a) the indictment or information;
(b) any sworn probable cause statement;
(c) information provided by any pretrial services agency; or
(d) any other reliable record or source.

(5) A motion to modify the initial order may be made by a party at any time upon notice to the opposing party sufficient to permit the opposing party to prepare for hearing and to permit any victim to be notified and be present. Hearing on a motion to modify may be held in conjunction with a preliminary hearing or any other pretrial hearing. The magistrate or court may rely on information as provided in Subsections (4)(a) through (d) and may base its ruling on evidence provided at the hearing so long as each party is provided an opportunity to present additional evidence or information relevant to bail.

(6) Subsequent motions to modify bail orders may be made only upon a

showing that there has been a material change in circumstances.

(7) An appeal may be taken from an order of any court denying bail to the Supreme Court, which shall review the determination under Subsection (1).

13.2.2 PRACTICE TIPS

Subsection (2) of the bail statute provides a great deal of latitude to the court in setting bail and conditions of release. The only real limitation of the power of the court in this situation is that any conditions be reasonable and that they relate to the four considerations of bail:

> (a) ensure the appearance of the accused;
> (b) ensure the integrity of the court process;
> (c) prevent direct or indirect contact with witnesses or victims by the accused, if appropriate; and
> (d) ensure the safety of the public.

¶ (d), ensuring public safety, is the most useful tool the prosecutor has at his or her disposal. By arguing this paragraph, a prosecutor can request that the court impose any number of conditions upon a DUI defendant, even before the case is adjudicated. These may include, but are not limited to:

- Prohibition on alcohol consumption or possession;
- Prohibition on driving unless defendant possesses a valid driver license;
- Installation and use of an interlock device;
- Attendance at alcohol or substance abuse counseling;
- Regular or random alcohol / drug testing;
- Regular reports to the court;
- Full time employment; and/or
- Any other condition designed to protect the public safety.

An important caveat to this is that bail conditions ***must not*** be punitive in nature. Like any other defendant, the person charged with DUI is presumed innocent until proven guilty. The conditions of release must be designed to ensure public safety consideration any number of relevant factors:

- Criminal history of defendant
- BAC level;
- Driving pattern and other facts of the case;
- Defendant's behavior and history of alcohol or substance abuse; and / or
- Defendant's employment or educational situation;

13.3 PRE-TRIAL MOTIONS

It would be an exercise in futility to list all of the potential pre-trial motions that may be filed in a criminal case. This manual should give any prosecutor the basic information needed to formulate a response to the majority of motions that will be filed by defense counsel. While an effort has been made to ensure that the most recent cases and statutes are contained herein, it is imperative that prosecutors verify all cases, statutes and rules prior to relying on them in a brief or memorandum. The materials contained in this manual are intended as a starting point for your DUI practice, not the end thereto.

Many of the common motions encountered in impaired driving cases are:

- Motion for Discovery;
- Motion to Suppress;
    - BAC results
    - Field Sobriety Test results based on imperfect compliance with procedures;
    - Statements made by defendant due to *Miranda* violations.

Obviously, this is just a very small sampling of potential motions, but it is the primary areas of focus by defense counsel.

Upon receipt of a pre-trial motion, the prosecutor should carefully read the motion and determine what the defendant is arguing or asking for. This is very important in discovery motions. It has become very common for defendants to include unusual or specific requests for discovery in the middle of their standard, boiler-plate requests. By careful reading the motion, prosecutors can avoid violating their disclosure obligations.

Additionally, a prosecutor should always file a written response to a

defense motion. Do not expect to be able to adequately present an argument to the court relying only on oral arguments. This will further assist in the event of a potential appeal.

13.4 PLEA NEGOTIATIONS

It is a well-established reality that nearly 90% or more of all criminal cases, including impaired driving cases, are resolved through some form of a negotiated plea. This may range from a straight-up plea with sentencing recommendations, a reduced charge, remaining silent at sentencing, to even and outright dismissal of the charge.

13.4.1 GENERALLY

More than twenty years ago, under President Ronald Regan, the Presidential Commission on Drunk Driving made the following recommendations which are as relevant today as they were in 1983:

> **RECOMMENDATIONS - PLEA BARGAINING**
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> Prosecutors and courts should not reduce DWI charges.
>
> **COMMENTARY**
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> Prosecutors should charge accurately, not overcharge or undercharge, and insist upon conviction on the appropriate charge. Prosecutors should not routinely plea bargain DWI charges to non alcohol-related offenses. Plea bargaining undermines the express will of the electorate and minimizes the consequences of engaging in illegal behavior. No DWI charge should be reduced or dismissed unless a written declaration is filed by the prosecutor stating why, in the interest of justice, it requires a reduction, or why the charge cannot be proven beyond a reasonable doubt.

Additionally, the American Bar Association Section of Criminal Justice made the following recommendations:

> The advisory board believes that plea negotiation, which results in convictions of lesser, non alcohol-related charges is not an

appropriate means of relieving court congestion and reducing the number of cases pending. The adverse effects on the highway safety process - specifically the failure to impose appropriate sanctions and the lack of a driving record that would identify the risk the offender poses should he or she be arrest subsequently - outweigh the time and expense saved by such charge reductions.

The board does; however, recognize that plea negotiation has a legitimate function in the disposition of some drunk-driving charges. Specifically, the board recommends the following standards for plea negotiation:

- The prosecutor should determine what charges should be filed;
- A reduction or dismissal of the charge is appropriate when:
    - It would not result in a substantial change in the defendant's sentence;
    - It is necessary to obtain the testimony of a material witness; or
    - There is insufficient evidence to prove the prosecution's case.
- If a plea negotiation occurs, the original charge and the reasons for the plea negotiation should be placed on the record, and there should be mechanisms in place to ensure that the record is available for future sanctioning of the defendant.
- When a drunk driving charge results in a disposition involving a lesser non alcohol-related offense (such as reckless driving) as a result of plea bargaining, that lesser should be identified on the driver's record as alcohol-related.

13.4.2 RESTRICTIONS ON PLEA NEGOTIATIONS

There are several statutory restrictions placed upon the resolution of impaired driving cases.

13.4.2.1 NEGOTIATING DRIVER LICENSE SUSPENSION

It was at one time fairly common for a prosecutor to agree to request the arresting officer to not appear at a driver license hearing in exchange for a defendant's plea. This should *never* be done in an impaired driving, or for that matter, any other case.

The Utah Rules of Professional Conduct specifically prohibit this type of negotiation (*emphasis added*):

Rule 3.4. Fairness to Opposing Party and Counsel.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) **falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law**;

(c) **knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists**;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(f)(1) the person is a relative or an employee or other agent of a client; and
(f)(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) **engage in conduct that is prejudicial to the administration of justice**;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

By knowingly requesting that an officer not respond to an order to appear before a DLD hearing, a prosecutor would clearly be violation of these rules. Furthermore, the legislature has repeatedly and expressly indicated the intent that an impaired driver’s driving privilege should be suspended or revoked, depending on the circumstance. It is always the best practice for prosecutors to understand that the actions of the Driver License Division are beyond the prosecutor’s purview.

13.4.2.2 PLEAS IN ABEYANCE

Pleas in Abeyance, where a defendant has the ability to have his charge dramatically reduced or dismissed upon completion of certain terms, are generally *not* allowed in DUI cases. Currently, pleas in abeyance are restricted to very limited situations in impaired driving cases:

77-2a-3.1. Restrictions on pleas to driving under the influence violations.

(1) As used in this section, a "driving under the influence court" means an intensive judicially supervised treatment program:

(a) as defined by rules of the Utah Judicial Council; and

(b) that has been approved by the Utah Judicial Council as a driving under the influence court.

(2) (a) A plea may not be held in abeyance in any case involving a driving under the influence violation under Section 41-6a-502 that is punishable as a felony or class A misdemeanor.

(b) A plea to a driving under the influence violation under Section 41-6a-502 that is punishable as a class B misdemeanor may not be held in abeyance unless:

(i) (A) the plea is entered pursuant to participation in a driving under the influence court; and

(B) the plea is approved by the district attorney, county attorney, attorney general, or chief prosecutor of a municipality; or

(ii) evidentiary issues or other circumstances justify resolution of the case with a plea in abeyance.

(3) A plea to a driving under the influence violation under Section 41-6a-502 may not be dismissed or entered as a conviction of a lesser offense pursuant to Subsection (2)(b)(i) if the defendant:

(a) has been convicted of any other violation which is defined as a conviction under Subsection 41-6a-501(2);

(b) has had a plea to any other violation of Section 41-6a-502 held in abeyance; or

(c) in the current case:

(i) operated a vehicle in a negligent manner proximately resulting in bodily injury to another or property damage to an extent requiring reporting to a law enforcement agency under Section 41-6a-401;

(ii) had a blood or breath alcohol level of .16 or higher; or
(iii) had a passenger under 18 years of age in the vehicle at the time of the offense.

updated 03.22.2007